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Nos. 86-1717 and 86-1718

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KALIMA JENKINS, *et al.*,
Petitioners

v.

THE STATE OF MISSOURI, *et al.*,
Respondents

THE KANSAS CITY, MISSOURI SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

THE STATE OF MISSOURI, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR STATE RESPONDENTS

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QUESTION PRESENTED

Whether, under *Milliken v. Bradley*, 418 U.S. 717 (1974), the court of appeals was required to order an interdistrict remedy despite findings that there was neither an interdistrict violation nor significant, current interdistrict effects.

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BRIEF IN OPPOSITION FOR STATE RESPONDENTS

STATEMENT

This lawsuit involves claims regarding the racial composition of the schools in the Kansas City metropolitan area. The suit was originally filed in 1977 by the Kan-

sas City, Missouri School District (the KCMSD) through its superintendent and its school board, and by students in the district. The named defendants included the State of Missouri, the Missouri State Board of Education and various Missouri officials, twelve Missouri School districts in the Kansas City metropolitan area, the State of Kansas, the Kansas State Board of Education and various Kansas officials, several Kansas school districts in the Kansas City metropolitan area, as well as the United States Department of Health, Education, and Welfare (HEW), the United States Department of Housing and Urban Development (HUD), and the United States Department of Transportation (DOT). The lawsuit alleged unconstitutional interdistrict segregation caused by acts of the defendants and sought a sweeping remedy involving reassignment of students across district and state lines.

In October 1978, the district court dismissed all of the Kansas defendants. *School District of Kansas City, Missouri v. State of Missouri*, 460 F. Supp. 421 (W.D. Mo. 1978). The court also realigned the KCMSD as a defendant. Thereafter, in May 1979, students in the KCMSD and in several of the defendant Missouri school districts filed an amended complaint.[1] All of the non-Kansas defendants named as defendants in the initial complaint remained defendants in the amended complaint, and the KCMSD was added as a new defendant.

The amended complaint, at least as construed by the district court, made two distinct claims: it realleged the interdistrict violation alleged in the original complaint; and it alleged an intradistrict violation, committed by the KCMSD and by the State defendants, within the KCMSD. In July 1979, the KCMSD asserted a simi-

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[1] The named plaintiffs were replaced at various times during the litigation. In February 1985, the court certified a class of all present and future KCMSD students.

larly dual cross-claim against the State defendants[2]; it sought indemnification for its intradistrict liability, and it made the same allegation of an interdistrict violation as that made by the plaintiffs.[3]

The trial of the case began in 1983. After hearing months of evidence by the plaintiffs and KCMSD, and before hearing evidence in response, the district court dismissed all of the suburban school districts from the case. Order of April 2, 1984. The Court found, in accordance with *Milliken v. Bradley*, 418 U.S. 717 (1974), that school districts in Missouri were autonomous and that none had committed any interdistrict violation. Further, in extensive and detailed fact findings, the court found that none of the discriminatory governmental actions advanced by plaintiffs or the KCMSD to support their interdistrict claims had any significant current interdistrict segregative effect. *See generally* Pet. App. 283a-493a.

The findings of fact in the June 5 Order addressed each of the theories for finding interdistrict liability. First, the court held that there had been no manipulation of district boundaries for racial reasons, finding a "[l]ack of proof of discriminatory intent in the establishment or changing of any school district boundary lines." Pet. App. 287a. Second, the court held that the

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[2] The state defendants were the State of Missouri, the Governor of Missouri, the Missouri State Board of Education and its members, and the Commissioner of Education of the State of Missouri. In March 1985, the Treasurer of the State of Missouri was added as a defendant necessary for relief.

[3] Before trial began in 1983, the United States Department of Transportration and one of the Missouri school districts were dismissed by stipulation, leaving the KCMSD, eleven suburban school districts (SSDs), the State defendants, HUD, and HEW (later dismissed) as defendants.

pre-1954 State segregation policy had no significant current interdistrict effects, finding plaintiffs' proof on this point to be "weak, speculative, and in any event *de minim*[*i*]*s*." Pet. App. 301a. Third, the court determined that the pre-1948 State enforcement of racially restrictive covenants had no significant current interdistrict effects. Pet. App. 363a. Taking these matters together, the district court concluded that "[a]t most, plaintiffs' evidence is *de minim*[*i*]*s* and is therefore insufficient" to support relief involving the SSDs. Pet. App. 499a.

The court then heard further evidence and, on September 17, 1984, issued its final liability ruling. *Jenkins v. State of Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984); Pet. App. 518a-617a. In that decision, it found liability for segregation within the KCMSD on the part of both the State defendants and the KCMSD. The court first noted the undisputed fact that, prior to 1954, the State and the KCMSD had imposed a mandatory dual school system upon the students in the KCMSD. The court stated that, "having created a dual system, the State and the KCMSD had and continue to have an obligation to disestablish the system." Pet. App. 604a. The court then found that "there are still vestiges of the State's dual school system still lingering in the KCMSD [and that] the obligations of the KCMSD and the State have not been met." Pet. App. 605a.[4]

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[4] *See also* Pet. App. 611a-12a ("Having found that there are still vestiges of the dual school system in the KCMSD, the Court finds the issues in favor of plaintiffs against the KCMSD and the State of Missouri and it further finds the issues in favor of the KCMSD against the State of Missouri.") The Court found no basis for liability in post-1954 State actions concerning vocational schools, highway location and relocation assistance, and Missouri Housing Development Commission programs. Pet. App. 557a, 589a-600a ("none of the aforementioned agencies committed any constitutional violation").

The court identified two such "vestiges" in its opinion. Of particular importance was the fact that "24 schools . . . are racially isolated with 90+% black enrollment." Pet. App. 545a. The court specifically found that, in light of this condition, "the District did not and has not entirely dismantled the dual school system." Pet. App. 545a. The court also found that "the inferior education indigenous of the State-compelled dual school system has lingering effects in the Kansas City, Missouri School District." Pet. App. 542a.[5]

The court ordered the State and the KCMSD to develop a remedial plan to "establish a unitary school system within the KCMSD." Pet. App. 614a. The KCMSD's initial plan proposed consolidation of the KCMSD with the SSDs. *See* KCMSD Plan for Remedying Vestiges of the Segregated Public School System (January 18, 1985). Because of its earlier rulings against the claims of interdistrict violation, however, the district court rejected this plan and ordered the KCMSD to prepare an amended plan "to be implemented within the existing boundaries of the [KCMSD], which would have the effect of removing the vestiges of the dual school system as it presently exists in the KCMSD." Order of January 25, 1985 at 3.

After submission of a new remedial plan by the KCMSD, and submission of alternative plans by the State defendants, the court held a two-week hearing on the scope of appropriate relief. In June, 1985, the court issued an order establishing a multifaceted district-wide remedial plan. Order of June 14, 1985. The plan contemplates a broad upgrading of conditions throughout the KCMSD, including additional teachers, all-day kindergarten programs, expanded summer school programs, be-

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[5] Although the court found that certain actions by the State, largely the passing of now-superseded statutes, had "encouraged racial discrimination by private individuals," it did not rest any determination of liability on such grounds. Pet. App. 601a-02a.

fore and after school tutoring, a voluntary transfer program with suburban districts, and renovation of school facilities. This plan is currently being implemented in the district.[6]

On appeal, the Eighth Circuit affirmed the denial of interdistrict relief.[7] With regard to "issues not related to housing," Pet. App. 8a, five judges (Gibson, Ross, Fagg, Wollman, and Arnold, JJ.) agreed that the findings and conclusions of the district court did not justify an award of interdistrict relief under *Milliken v. Bradley*, *supra*. On the housing issues, the court affirmed the denial of interdistrict relief by an equally-divided vote, with Judge Arnold voting to remand the case to the district court "to consider whether there are interdistrict housing violations which would require relief." Pet. App. 8a-9a. Three judges (Lay, C.J., Heaney, and McMillian, JJ.) dissented.

The extensive plurality opinion, which is further discussed at pages 10-16, *infra*, drew its "basic guidance" regarding the standards for interdistrict relief from *Milliken v. Bradley*, *supra*. Pet. App. 33a. It thus recognized that " 'it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.' " Pet. App. 33a, quoting *Milli-*

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[6] Subsequently, in separate orders issued in June and November, 1986, the district court ordered implementation of a magnet school plan that turns all of the senior high schools, all of the junior high schools, and approximately one-half of the elementary schools into magnet schools. Although the State proposed that some schools be made into magnet schools, it has appealed the district court orders on the ground that they are unnecessarily broad. At present, the orders are back before the district court to allow for additional findings, after which it is expected that the appeal of the orders will proceed.

[7] The court of appeals also affirmed the intradistrict relief with certain modifications. Pet. App. 116a-36a. No party has sought review of that portion of the decision.

ken v. Bradley, *supra*, 418 U.S. at 745. Later, the plurality, after discussing both *Milliken v. Bradley* and *Hills v. Gautreaux*, 425 U.S. 284 (1976), stated: "*Milliken* and *Hills* make clear that we may grant interdistrict relief only to remedy a constitutional violation committed by an SSD, or to remedy an interdistrict effect in the SSD caused by a constitutional violation in KCMSD." Pet. App. 63a.

The plurality then reviewed the findings of the district court, concluding that they established the existence of neither an interdistrict violation nor any significant current interdistrict effects. It noted that the district court "first carefully considered whether the SSDs had violated the Constitution. It found that they had not." Pet. App. 63a. In addition, the plurality found that the district court "dealt not only with the issue of whether the SSDs were constitutional violators but also whether there were significant interdistrict segregative effects." Pet. App. 66a. The plurality added: "When it did so, it made specific findings that negate current significant interdistrict effects, and concluded that the requirements of *Milliken* had not been met." Pet. App. 66a.[8]

The plurality emphasized "the importance of the district court's factual findings in school desegregation cases." Pet. App. 37a. Having stated its view that "[t]he arguments of the Jenkins class [petitioners in No. 86-1717] run contrary to the facts found by the district court," Pet. App. 57a, it declined to "substitute its judgment for that of the district court." Pet. App. 58a. Similarly, it disagreed with the dissenting judges' treatment of the factual findings, saying that those judges had engaged in "the rejection of the district court's carefully weighed findings of fact and substitution of those

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[8] The findings of the district court regarding the absence of interdistrict effects are discussed in more detail at pages 10-13 *infra*.

more desirable, frequently based on evidence considered and rejected by the district court." Pet. App. 40a-41a. The plurality held that such "appellate factfinding" was "directly contrary to the mandate of *Anderson* [*v. City of Bessemer City*, 105 S.Ct. 1504 (1985)]." Pet. App. 40a-41a.

In his separate opinion, Judge Arnold disagreed with the plurality's reading of the factual findings relating to housing, stating that "the District Court never finally determined whether or what current interdistrict segregation is attributable to these housing violations." Pet. App. 157a.[9] In the absence of such a final resolution, Judge Arnold said, "the case should be remanded to the District Court to determine precisely what current interdistrict segregative effects may be attributed to housing discrimination by the State [and other entities]." Pet. App. 176a.

The dissenting judges took still a different view, stating that "the record does not support the district court's conclusions." Pet. App. 181a. Those judges believed that "the district court's factfinding process was tainted with legal error" and, therefore, that its findings were "entitled to less than usual deference and should be reversed as clearly erroneous." Pet. App. 185a. The dissenting judges would have reversed the judgment dismissing the suburban districts and HUD, and remanded the case for further evidentiary hearings and, if then appropriate, for the imposition of an interdistrict remedy. Pet. App. 187a-88a.

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[9] In this regard, Judge Arnold noted references by the district court "to a number of instances of housing discrimination by the State and its subdivisions that could have had such segregative effects." Pet. App. 156-57a. The plurality concluded that these references "fall short of making a specific finding of a constitutional violation, and certainly make no finding of any interdistrict effect." Pet. App. 90a.

ARGUMENT

Petitioners in this desegregation case are seeking review of a decision that the court of appeals did not render. According to the petitions, the court of appeals refused to order interdistrict relief, despite findings of current interdistrict effects resulting from violations by the State or other parties, on the ground that each suburban school district had not itself committed a constitutional violation, This refusal, say petitioners, is in conflict with the decision of this Court in *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*), and with decisions of other federal courts of appeals. Additionally, petitioners in No. 86-1717 (the "Jenkins petitioners") argue that the failure to eradicate the interdistrict effects is contrary to the principles set out in *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979) (*Dayton II*).

The actual decision of the court of appeals is very different. The plurality correctly recognized that, before an autonomous school district may be compelled to participate in an interdistrict remedy, *Milliken I* requires, at the very least, either a showing of an interdistrict violation by that district or a showing of current interdistrict effects in the district. Applying that principle here, the plurality reviewed the detailed findings made by the district court and concluded that those findings showed, first, no interdistrict violations by the suburban districts and, second, no significant, current interdistrict effects in those districts. Because of these findings, its decision to deny interdistrict relief was entirely consistent not only with the holding of *Milliken I* but with the holding of every federal decision granting interdistrict relief, all of which have conditioned such relief on a demonstration of interdistrict effects. Likewise, because it found that no interdistrict effects remain, the plurality did not depart from any requirement established in *Dayton II* of assuring that the vestiges of prior discrimination have been eliminated. Further review of these factual matters is not warranted.

1. The Decision Below Is Not in Conflict With *Milliken I* or Interdistrict Cases from Federal Courts of Appeals.

A. The first task, given the nature of the petitions for certiorari, is to identify just what the court of appeals did and did not decide. Contrary to petitioners' representations, the plurality did not decide that the findings showed continuing interdistrict effects but that interdistrict relief was barred by the absence of an interdistrict violation on the part of each defendant school district.[10] Instead, it decided that the findings showed no current interdistrict effects and, as a consequence, no basis for awarding relief under any possible reading of *Milliken I*.

The emphasis given to the lack of interdistrict effects would seem hard to miss: the plurality took great care to review each of the findings of the district court leading to that conclusion. In the very first paragraph of its opinion, summarizing the decision of the district court, the plurality noted that "there was no finding of interdistrict violation or interdistrict effect." Pet. App. 7a. Similarly, in a more detailed review of the district court decision, the plurality specifically pointed to two findings supporting the denial of interdistrict relief: "that within four years after *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and in most cases within a shorter time, all the SSDs had eradicated the vestiges of

[10] In No. 86-1718, for example, petitioners state the following "Question Presented": "Whether the court below erred in this interdistrict school desegregation case by requiring proof that each and every school district committed independent constitutional violations with a segregative effect on the Kansas City, Missouri School District, despite proof that all the defendant districts participated in and were affected by the State-created metropolitan-wide racially dual school system." KCMSD Pet. i. In No. 86-1717, petitioners describe the plurality opinion as holding that "interdistrict relief is available only if there has been a racially discriminatory act *by each defendant district*." Jenkins Pet. 38, *quoting* June 1984 Order (emphasis added by petitioners).

their dual school systems and were operating unitary systems" and that "none of the alleged discriminatory actions committed by the State or the federal defendants had caused any significant current interdistrict segregation." Pet. App. 13a-14a. The plurality then set forth separately a series of findings with regard to the issue of interdistrict relief, Pet. App. 16a-26a, pointing out that the district court had "rejected the argument that within the SSDs any vestiges or significant effects of the pre-1954 dual school system remained," Pet. App. 19a, and had found that pre-1948 enforcement of racial covenants in housing "did not have a current significant segregative effect." Pet. App. 24a-25a.

The plurality repeatedly relied on these and other findings in addressing each theory advanced by petitioners for interdistrict relief. It began with arguments based upon the existence of mandatory segregation prior to 1954—arguments that it found to be "considerably narrowed when viewed in light of significant factual findings of the district court." Pet. App. 47a. Noting that the district court had found "the pre-*Brown* acts thirty years past to have negligible present effects," Pet. App. 48a, the plurality concluded that "[t]he factual argument based on the pre-*Brown* interdistrict system of locating dual schools flies in the face of the district court's finding that the pre-*Brown* acts have negligible present effects." Pet. App. 49a. For the same reason, the plurality was unpersuaded by "the argument that the SSDs, though not at fault, would still be liable to take part in eliminating the effects on children in their districts of the State's metropolitan-wide dual school violations . . . ." Pet. App. 53a-54a. The plurality held that this theory "suffer[ed] from two fatal deficiencies [:] [i]t ignores the lack of finding of any such effects, and is contrary to the district court's findings that within at most four years after *Brown I*, any vestiges of the dual school systems that may have existed in the SSDs had been eliminated." Pet. App. 54a.

The plurality also held that the findings of fact defeated petitioners' arguments based upon claims of housing discrimination. It again emphasized that the district court had made "specific findings that negate the existence of significant interdistrict current effects in the SSDs." Pet. App. 74a. The plurality thus gave great weight to findings that the location of schools prior to 1954 "did not discourage black families from outside or within Missouri from moving to and living in [the suburban] districts" (Pet. App. 74a-75a); that "the substantial increases in the KCMSD black population were in large part due to the unusual economic and employment ramifications of the World Wars and intervening Depression" (Pet. App. 75a); that "the restrictive covenants [enforced until 1948] have no current effect in the SSDs" (Pet. App. 77a); and that the findings with regard to the claims against HUD "belie the possibility of interdistrict effect occurring in the SSDs." Pet. App. 86a. It finally concluded that "[t]he findings made were adequate to dispel the conclusion required by *Milliken* that there be significant segregative effects in the SSDs caused by actions of a constitutional violator in KCMSD." Pet. App. 93a.[11]

Although petitioners argued in the court of appeals that certain statements by the district court constituted findings of interdistrict effects, the plurality decided otherwise. Thus, while petitioners pointed to parts of the September 1984 opinion discussing a "dual housing market" and private discrimination "encouraged" by the State, the plurality said that these observations, read in the context of the full findings of fact, "fall short of making a specific finding of a constitutional violation, and certainly make no finding of any interdistrict effect."

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[11] We note that, in 41 pages of Statements purporting to set forth the facts of this case, petitioners do not refer to even a single one of the findings included in the paragraphs in the text, *supra*; they acknowledge neither that the district court made them nor that the plurality explicitly relied on them.

Pet. App. 90a. To the contrary, the plurality "conclude[d] that the factual findings of the district court effectively foreclose findings of interdistrict effect in the SSDs flowing from constitutional violations with respect to housing that may have occurred in KCMSD." Pet. App. 91a.

The petitions in this case make no effort to come to grips with these statements; indeed, they are framed as though the statements had never been made.[12] This neglect, however, severely distorts the meaning of the plurality opinion. The plurality "recognize[d] at the outset the importance of the district court's factual findings in school desegregation cases." Pet. App. 37a. And it observed that the role of an appellate court with regard to factual findings was a limited one, all the more so in this case because petitioners had elected not to challenge the findings as clearly erroneous. Pet. App. 42a, 47a; see *Anderson v. City of Bessemer City*, 105 S. Ct. 1504 (1985). Petitioners thus are not free to separate the court of appeals' holding from the findings on which it expressly depends.

B. The decision below, read properly, fits well within the requirements of *Milliken I*. The plurality, relying upon the findings set forth above, applied *Milliken I* carefully, ultimately resolving that even the most minimal predicates for granting interdistrict relief had not been met.

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[12] Petitioners in No. 86-1718 assert that "the district court and the Eighth Circuit plurality never actually engaged in an analysis of whether State violations had substantial segregative effects in the surrounding districts." KCMSD Pet. 17. This statement is hard to credit when the plurality expressly noted findings, among others, showing that "the pre-*Brown* acts have negligible present effects" (Pet. App. 49a) and "effectively foreclos[ing] findings of interdistrict effect in the SSDs flowing from constitutional violations with respect to housing that may have occurred in KCMSD" (Pet. App. 91a). The difficulty faced by petitioners does not arise from a lack of analysis of interdistrict effects but from the fact that, on the interdistrict issues, "[p]laintiffs' proof was weak, speculative and in any event *de minim*[*i*]*s*." Pet. App. 301a.

The plurality began its discussion of the merits by setting out the standards governing interdistrict relief under *Milliken I*: "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation." Pet. App. 33a, quoting *Milliken I*, 418 U.S. at 744-45. The plurality further noted that "the interdistrict segregative effects [must be] current." Pet. App. 35a-36a.

The plurality discussed the standards of *Milliken I* again in addressing petitioners' contention that the district court had mistakenly required a showing of violations by each and every school district. After examining both *Milliken I* and the explanation of that case in *Hills v. Gautreaux*, 425 U.S. 284 (1976), the plurality stated: "*Milliken* and *Hills* make clear that we may grant interdistrict relief only to remedy a constitutional violation committed by the SSD, *or* to remedy an interdistrict effect in the SSD caused by a constitutional violation in KCMSD." Pet. App. 63a (emphasis added). To apply this standard, it evaluated the findings of the district court to see whether they established *either* an interdistrict violation by the SSDs *or* current interdistrict effects in the SSDs. Pet. App. 63a-95a.

The plurality thus did not say that interdistrict relief requires a violation by each school district to be included in the remedy, nor did it endorse any such holding by the district court. To the contrary, the plurality took pains to show that the district court did not stop with the issue of liability of the suburban districts but assessed the effects in those districts of other actions al-

leged by petitioners. Pet. App. 65a-66a. The plurality noted: "The district court thus dealt not only with the issue of whether the SSDs were constitutional violators but also whether there were significant interdistrict seggative effects. [Citation omitted] When it did so, it made specific findings that negate current significant interdistrict effects, and concluded that the requirements of *Milliken* had not been met." Pet. App. 66a.[13]

The plurality also went over the findings of fact in detail, satisfying itself that no basis for interdistrict relief had been shown. As we have previously noted, that review included a discussion of the statements regarding a "dual housing market" and the encouraging of private discrimination relied upon heavily by petitioners here. Having considered all the findings, the plurality concluded that, even if the district court had misread *Milliken I* by relying too much on the element of liability, its findings "effectively foreclose findings of interdistrict effect in the SSDs flowing from constitutional violations with respect to housing that may have occurred in KCMSD." Pet. App. 91a.[14] Without either an interdis-

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[13] Although petitioners insisted before the court of appeals that the district court misread *Milliken I*, and that reversal was thus required, the plurality was unconvinced for several reasons. Although it agreed that "[t]he court's order admittedly emphasizes the absence of culpability of the suburban districts," Pet. App. 65a, it observed that "the court explicitly recognized that under *Milliken* 'there must be evidence of a constitutional violation in one district that produces a significant segregative effect in another district.'" Pet. App. 65a, *quoting* Order of June 5, 1984. The plurality then noted that the district court specifically considered the issue "whether there were significant interdistrict segregative effects." Pet. App. 66a. Given the extensive findings regarding the lack of such effects, the plurality decided that petitioners had shown no basis for interdistrict relief even if their arguments regarding the district court's reading of *Milliken I* were accepted. Pet. App. 90a-91a.

[14] Judge Arnold in his separate opinion disagreed with this view of the district court findings, and suggested that both the plurality and the district court gave too much attention to the lack of culpa-

trict violation or interdistrict effects, the plurality perceived no basis for interdistrict relief.

This holding, far from being incompatible with *Milliken I*, follows unavoidably from it. In that case, the Court concluded that a violation occurring within a single district and with effects confined to that district was an inadequate basis for requiring other, autonomous districts to participate in an interdistrict remedy. While the Court at times seemed to imply that the lack of culpability of the other districts was itself a factor weighing against interdistrict relief, *see, e.g.*, 418 U.S. at 745 (rejecting imposition of remedy on districts "not shown to have committed any constitutional violation"), it is clear that at least a showing of significant interdistrict effects was necessary to justify imposing the remedy on those districts. The plurality below made just that inquiry; it simply decided that no such effects had been shown here.

C. The decision below is also consistent with the decisions of other courts of appeals. None of the cases cited by petitioners, or any other case so far as we are aware, has imposed an interdistrict remedy in the absence of a showing of current, significant interdistrict effects.

The decision of the three-judge court in *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975), provides a ready example. There, after discussing the standards of *Milliken I*, the court observed that "to the extent that segregation imposed by state law has had interdistrict effects, federal courts can fashion appropriate interdistrict remedies." *Id.* at 432. It

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bility of the SSDs. Pet. App. 145a-146a n.1. He pointed out, however, that even if the plurality believed in a requirement of culpability (as, in his view, they "seem[ed] to"), that belief would not be controlling in the Eighth Circuit itself. Rather, the question of the scope of a proper remedy in a case involving interdistrict effects but no individual violations "is . . . open for determination in future cases in this Circuit." Pet. App. 180a.

then made findings regarding a number of government practices, related to both schools and housing, stating in conclusion that "[t]his conduct constitutes segregative action with inter-district effects." *Id.* at 438. Similarly, it found that a state statute precluding consolidation of the Wilmington school district with other districts "played a significant part in maintaining the racial identifiability of Wilmington and suburban New Castle County school districts." *Id.* at 445.

The same sorts of concerns were present in *United States v. Board of School Commissioners*, 573 F.2d 400 (7th Cir.), *cert. denied*, 439 U.S. 824 (1978). In that case, the court of appeals expressly stated, relying on *Milliken I*, that "[b]efore a court may impose an interdistrict remedy, a constitutional violation, *i.e.*, intentional state action, must exist which has significant segregative interdistrict effects." 573 F.2d at 405. The court subsequently found that certain state action regarding school boundaries had such effects. *Id.* at 407-08. It also indicated that various housing practices could support an interdistrict remedy, even if they had ceased, provided that "it is shown that prior discriminatory practices have a continuing segregative effect on housing patterns (and, in turn, on school attendance patterns) within the Indianapolis metropolitan area." *Id.* at 409.

The plurality below distinguished these and other cases, not because they required only a showing of interdistrict effects, but because no interdistrict effects were shown here. Indeed, with regard to *Evans* and *Board of School Commissioners*, the plurality said flatly that "[t]he facts relied on to support the housing violations . . . are directly contrary to those found in this case." Pet. App. 83a; *see also* Pet. App. 95a-99a.[15]

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[15] In *Newburg Area Council, Inc. v. Board of Education of Jefferson County, Kentucky*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 429 U.S. 1074 (1975), the court of appeals stated: "A crucial difference between the present cases and *Milliken* is that school

Petitioners in No. 86-1718 (the "KCMSD petitioners") also accuse the plurality of "effectively erect[ing] a new rule—that interdistrict effects of a constitutional violation give rise to an interdistrict remedy only where those effects are caused by the gerrymandering of boundaries . . . ." KCMSD Pet. 18. The rule is wholly imaginary. The plurality did not say that manipulation of boundaries was the only justification for interdistrict relief; it merely noted, quite correctly, that cases involving interdistrict relief commonly involve such manipulation and that nothing of the sort was established in this case. Pet. App. 95a. Furthermore, of course, the plurality took dozens of pages to review, and ultimately reject on the basis of the factual findings, each of petitioners' contentions regarding interdistrict relief—including those grounded in allegations about school assignments or housing practices—without any suggestion that the contentions were foreclosed *ipso facto* by a failure to mention boundaries.

In short, the decision below does not rest upon a failure of the plurality to follow *Milliken I*, or to apply the same principles invoked by other courts of appeals; it rests upon the failure of petitioners in this case to show that racial disparities between the city and suburban districts are the result of deliberate governmental discrimination. Although petitioners sought to establish that cause-and-effect relationship over months of trial, the district court found to the contrary, and those findings, never challenged as clearly erroneous, controlled the

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district lines in Kentucky have been ignored in the past for the purpose of aiding and implementing continued segregation. Such disregarding of school district lines *continues to have an effect on racial imbalance in the county's schools . . . .*" *Id.* at 1380 (emphasis added). In *Hoots v. Commonwealth of Pennsylvania*, 672 F.2d 1107 (1982), the court noted findings, among others, that "district lines have been deliberately drawn on the basis of race" (*id.* at 1116) (internal quotes omitted) and that various districts had been intentionally created "as identifiably black and white districts" (*id.* at 1120). These conditions existed at the time of suit. *Id.* at 1110-13.

disposition on appeal. Petitioners' efforts to get around those findings, and to recast the decision below as something it is not, should be rejected.

2. The Decision Below Is Not a Departure from the Principles of *Dayton II*.

The Jenkins petitioners make a further argument that the decision below is inconsistent with the principles of *Dayton II*. Once again, the argument runs aground on the factual findings in this case.

This Court held in *Dayton II* that a school district, having once engaged in intentional segregation, has a continuing duty to see that the effects of that segregation are eradicated. That duty, as the Court went on to observe, includes "the obligation not to take any action that would impede the process of disestablishing the dual system and its effects." 443 U.S. at 538. Asserting that respondents failed to fulfill that duty here, the Jenkins petitioners argue that various conduct, in particular the failure to expand the boundaries of the school district, has left in place interdistrict effects requiring an interdistrict remedy.

The obvious problem with this argument, as with petitioners' other contentions, is that it ignores the findings regarding the lack of interdistrict effects. The district court found, and the plurality below accepted, that no effects of any prior *inter*district segregation presently existed; all that remained to be undone were the effects of *intra*district segregation, for which the court imposed a substantial intradistrict remedy. Thus, insofar as petitioners' interdistrict claims are concerned, the duty to see that effects of prior actions are not continuing, and the corresponding obligation not to impede execution of that duty, has been met. That is all that *Dayton II* requires.[16]

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[16] As the plurality below recognized, the findings of the district court were anything but conclusory ones. Noting the existence of racial disparities between the KCMSD and suburban districts, the

Given the findings below, petitioners' argument seems less an effort to apply the teachings of *Dayton II* than one to avoid the teachings of *Washington v. Davis*, 426 U.S. 229 (1976). In the latter case, this Court held that the essential predicate of a constitutional remedy is "current conditions of segregation resulting from intentional state action." *Id.* at 240. Here, petitioners are seeking to base a remedy on the supposed effects of one action (the failure to expand district boundaries), which the district court specifically found not to have been taken with any discriminatory intent, Pet. App. 334a-39a, and to do so by saying that it was necessary to correct for the effects of some other action. Whatever merit this argument might have in a proper case, it is clearly out of place where the effects of the other action no longer are continuing. In that context, it is nothing more than an attempt to treat nondiscriminatory conduct as though it were a constitutional violation.

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district court examined decades of actions to determine whether the disparities were the result of intentional governmental discrimination. In so doing, it found that the actions cited by petitioners had *de minimis* interdistrict effect at the time and had no significant *current* effect. Instead, the court found, other factors, such as the availability of jobs and economic opportunities, were far more important. *See generally* Pet. App. 283a-493a.

CONCLUSION

The petitions for writs of certiorari should be denied.

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